APPENDIX A

Filed: March 9, 1995

IN THE SUPREME COURT OF THE STATE OF OREGON

JOHN D. MORRIS,

Appellant,

v.

DEPARTMENT OF REVENUE,
State of Oregon,

Respondent.

(OTC 3437; SC S40774)

In Banc

On appeal from the Oregon Tax Court.

Carl N. Byers, Judge.

Argued and submitted October 31, 1994.

John Eric Wilkes, of Callaghan & Wilkes, Salem, argued the cause and filed a reply brief for appellant. John D. Morris, appellant, filed the opening brief pro se.

Jerry Bronner, Assistant Attorney General, Salem, argued the cause for respondent. With him on the brief was Theodore R. Kulongoski, Attorney General, Salem.

CARSON, C. J.

The decision of the Tax Court is vacated. The case is remanded to the Tax Court with instructions to dismiss the proceeding.

CARSON, C. J.

This case comes before us on direct appeal of a Tax Court judgment sustaining an assessment of personal income taxes, penalties, and interest by the Department of Revenue (the departments) against plaintiff for the 1985 tax year. Plaintiff argues that he was not an Oregon resident in 1985 and that, consequently, he is not required to pay Oregon income tax for that year. The department responds that plaintiff's argument was one that he first had to make before the director of the department, that he did not do so, and that the failure to do so forecloses plaintiff from making the argument now. For the reasons that follow, we agree with the department.

Plaintiff did not file an Oregon tax return for the 1985 tax year. He did, however, file a timely federal tax return for 1985, showing an Oregon address. The Internal Revenue Service (IRS) notified the department that plaintiff had filed a federal return with an Oregon address. In December 1988, and in January 1989, the department sent plaintiff letters informing him that the department had not received a 1985 tax return and asking him to file a return. In March 1989, the department sent plaintiff another letter demanding that he file a return within 30 days. Plaintiff did not respond to any of the letters. In July 1989, the department mailed

a Notice of Determination and assessment to plaintiff.[3] The envelope was returned to the department, marked "Attempted - Not Known." Plaintiff again did not respond to the department. All three letters and the notice of determination and assessment were sent to an address in St. Helens, Oregon, which was provided by the IRS and was confirmed by the department by checking the records of the Motor Vehicles Division (MVD).

In August 1990, plaintiff communicated with the department about the 1985 assessment, for the purpose of removing a tax lien arising from the unpaid assessment. In April 1991, plaintiff requested an appeal of the assessment before the director of the department. The director granted plaintiff a hearing but, after the hearing, concluded that he would not disturb the final assessment because plaintiff had not appealed from the notice of determination and assessment within 90 days, as required by statute. ORS 305.280(2)[4] ("An appeal * * * from any notice of assessment * * * shall be filed within 90 days from the date of the notice."). The

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[3] This notice advised plaintiff that the department had assessed taxes, penalties, and interest against him for the 1985 tax year.

[4] The statutes in effect in 1989, the year in which the taxes were assessed, control this case. Because there have been no pertinent changes in the code since that time, we cite to the 1993 version of the statutes throughout this opinion.

director also determined that plaintiff was not entitled to relief under ORS 305.295,[5] because he was an Oregon resident in 1985, and the State of Oregon may tax all the income of its residents under the Oregon Constitution and federal law. See, e.g., Keller v. Dept. Of Rev., 319 Or 73, 78, 872 P2d 414 (1994) ("The state's taxing authority extends to all of the income earned by its residents, including income earned outside the state."). The director of the department dismissed the appeal and concluded that plaintiff owed $4,863.68 (plus accruing interest) in income taxes, penalties, and interest.

Plaintiff then filed a complaint in the Tax Court, arguing that he had not been an Oregon resident during the 1985 tax year and, therefore, that he was not subject to Oregon income taxation for that year. The Tax Court concluded that plaintiff had been an Oregon resident during the 1985 tax year and sustained the director's order and opinion.

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[5] ORS 305.295(1) provides, in part:

"[T]he Department of Revenue may in its discretion, cancel any tax, penalty or interest for which an assessment has become final, if any of the following conditions exist:

"(a) The assessment is based upon an asserted tax deficiency calculated upon income that the state is expressly prohibited from taxing under the Oregon Constitution or the laws of the United States."

Plaintiff seeks direct review in this court, again arguing that he was not a resident of Oregon during the 1985 tax year and, thus, that he was not subject to personal income taxation for that year. In response, the department argues, among other things, that the Tax Court and this court do not have a basis upon which to address the merits of plaintiff's appeal because an assessment of income taxes by the department becomes final if it is not appealed to the director within 90 days and because plaintiff failed to pursue, and to exhaust, his administrative remedies in a timely manner.

Before we turn to the merits of plaintiff's argument, we must decide whether the Tax Court had a basis upon which to hear this appeal. ORS 305.275(4) provides, in part: "[N]o person shall appeal to the Oregon Tax Court * * * on any matter arising under the revenue and tax laws administered by the department unless the person first exhausts the administrative remedies provided before the department and the director." (Emphasis added.)

ORS 305.275(1) provides that any person aggrieved by an act of the department "may appeal to the Director of the Department of Revenue in the manner provided by this section." As stated above, ORS 305.280(2) requires that an appeal to the director of the department from a notice of determination and assessment "shall be filed within 90 days from the date of the notice."

In order to exhaust administrative remedies sufficient to satisfy ORS 305.275(4), a taxpayer must pursue the available

administrative remedies in a timely manner. See, e.g., Ebert v. Dept. of Rev., 307 Or 649, 652-53, 771 P2d 1018 (1989) (holding that Tax Court did not have a statutory basis upon which to hear a challenge of an assessment of income tax because plaintiff failed to challenge the assessment before the department within 90 days). ORS 305.265(11) provides that "[m]ailing of notice to the person at the person's last-known address shall constitute the giving of notice as prescribed in this section." Once notice is given, the 90-day appeal period begins to run. ORS 305.280(2). Plaintiff argues that, because the department did not send the notice of determination and assessment to his "last-known address," the department did not provide notice of determination and assessment as required by the statute and, therefore, that plaintiff was not untimely in challenging the assessment.

We disagree. Although this court heretofore has not interpreted the meaning of "last-known address," we conclude that the department satisfied its obligation to provide notice under ORS 305.265(11).[6] "Last-known address" ordinarily refers to the address provided on the last Oregon income tax return filed by the taxpayer. Cf. United States v. Zolla, 724 F2d 808, 810 (9th Cir), cert den 469

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[6] In 1992, the department promulgated a rule that instructs the department how to determine a taxpayer's "last-known address." See OAR 150-305.265(11) (setting forth procedure for ascertaining a taxpayer's last-known address).

US 830 (1984) (under Internal Revenue Code, last-known address is the one on the most recent tax return unless taxpayer gives clear and concise notice of a change of address); Eshweiler v. U.S., 946 Fed 45, 48 (7th Cir 1991) (under Internal Revenue Code, last-known address is the one on the return being audited unless taxpayer gives "clear and concise" notification of a change).[7]

However, the "last-known address" changes if the department has actual notice that the taxpayer's address has changed. Once the department has such notice, it is required to use reasonable diligence in ascertaining the taxpayer's last-known address. Cf. Eshweiler v. U.S., supra, 946 F2d at 48 ("The IRS need only exercise reasonable diligence in attempting to discover the taxpayer's last known address.").

In this case, plaintiff's last Oregon tax return was filed in 1981. The department, on its own, determined that the address was too old to use as the last-known address. In October 1988, after the IRS notified the department that plaintiff had filed a return with an Oregon address, the department requested a "federal transcript," which provided the department with the information from plaintiff's 1987 federal tax return. Plaintiff's 1987 return showed a St. Helens address.

The department sent the three preliminary letters to that

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[7] Federal tax law does not control the tax law of Oregon. We cite federal cases only when we find them persuasive.

address. The department received no notice that those letters were undeliverable at that address. In May 1989, the department obtained a MVD computer printout, which showed the same St. Helens address. Plaintiff had an obligation to notify the MVD of any change of address. See ORS 807.560 (it is a Class D infraction to fail to notify the MVD within 30 days of a change of address from the address noted on a driver license.).

Based on the foregoing information, the department concluded that the St. Helens address was the last-known address and, on July 12, 1989, sent the notice of determination and assessment to that address. As previously observed, that letter was returned, marked "Attempted - Not Known." Plaintiff argues that the department was obligated to continue looking for his new address at that point. We disagree. The last-known address is determined at the time when the notice of determination and assessment is sent. Cf. Armstrong v. CIR, 15 F3d 970, 975 (10th Cir 1994) ("We agree with the Fifth, Seventh, and Ninth Circuits, as well as the [United States] Tax Court, that the IRS's duty to exercise reasonable diligence in ascertaining a taxpayer's last known address extends only to the point in time when the deficiency notice is mailed.").

We conclude that the department exercised reasonable diligence in determining that the St. Helens address provided by the IRS and confirmed by the MVD was plaintiff's last-known address.

Thus, the department gave notice of the assessment, as required by ORS 305.265(11), on July 12, 1989. Accordingly, plaintiff was required to appeal the assessment to the director within 90 days from that date. Plaintiff did not appeal within the statutory required time. His appeal to the director was not timely under ORS 305.280(2).

Plaintiff argues, in the alternative, that his appeal was not an appeal of the assessment, but rather an appeal from a denial of a claim for a refund under ORS 305.270 (governing claims for refunds). ORS 314.415(1)(b) provides that "[n]o refund shall be allowed or made after three years from the time the return was filed, or two years from the time the tax or a portion thereof was paid." Plaintiff argues that he challenged the denial of a refund within the two years and, therefore, that he made a timely claim and exhausted his administrative remedies.

That argument is unpersuasive. As this court held in Van Tran v. Dept. Of Rev., 320 Or 170, 174, 880 P2d 924 (1994), cert den 63 USLW 3625 (US 1995), a taxpayer may not fail to appeal an assessment within the appointed time and then later seek a refund, arguing that the basis for the assessment was improper.[1] The

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[1] In fact, plaintiff's argument in this case is even farther afield than the argument made by the taxpayer in Van Tran. In Van Tran, the taxpayer paid the money due pursuant to the assessment before claiming the refund. Van Tran v. Dept. of Rev., 320 Or 170, 174, 880 P2d 924 (1994), cert den 63

taxpayer is required to challenge the assessment within 90 days or the assessment becomes final. ORS 305.265(14) and 305.280(2). Plaintiff did not challenge the assessment within 90 days; therefore, he failed to exhaust his administrative remedies, and the Tax Court had no basis upon which to address the merits of plaintiff's appeal. ORS 305.275(4).

One further issue deserves mention. Plaintiff argued before the director of the department that the department did not have jurisdiction to tax him because he was not a resident of Oregon. The director treated that argument as an appeal of the department's denial of a request to cancel a tax pursuant to ORS 305.295(1). That statute provides, in part:

> "(1) Notwithstanding ORS 305.265(14), the Department of Revenue may in its discretion, cancel any tax, penalty or interest for which an assessment has become final, if any of the following conditions exist:
>
> "(a) The assessment is based upon an asserted tax deficiency calculated upon income that the state is

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USLW 3625 (US 1995). In this case, plaintiff argues that, even though he did not pay any taxes pursuant to the assessment, he was granted a hardship exception under ORS 305.419(3) by the Tax Court that extends to an appeal of a denial of refund as well as to a challenge of an assessment. Based on that leap of logic, plaintiff claims that he may file for a tax refund before he pays any of the assessed taxes. We do not find that argument persuasive.

> expressly prohibited from taxing under the Oregon Constitution or the laws of the United States.
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> "* * * * *
>
> "(6) A taxpayer may appeal denial of a request for cancellation of assessment or refund to the director. The decision of the director is final and may not be appealed."

The director considered plaintiff's argument that the department did not have jurisdiction to tax him and concluded that plaintiff was an Oregon resident, giving the department the authority to tax him. Plaintiff is not entitled to review of that decision either in the Tax Court or in this court. ORS 305.295(6).

Plaintiff is not excused from the requirement that he exhaust his administrative remedies, nor did he exhaust those remedies; therefore, under Oregon statutory law, the Tax Court had no basis upon which to address plaintiff's claim on the merits.

The decision of the Tax Court is vacated. The case is remanded to the Tax Court with instructions to dismiss the proceeding.

APPENDIX B

IN THE OREGON TAX COURT

Income Tax

No. 3435

JOHN D. MORRIS,)
)
Plaintiff,)
)
v.)
)
DEPARTMENT OF REVENUE,)
State of Oregon,)
)
Defendant.)

OPINION

Plaintiff appeals an assessment of income taxes for 1985 on the grounds that he was not a resident and earned no income in Oregon.

Plaintiff was born and raised in Arkansas. In 1956 he entered the United States Navy. In 1966 he married a native Oregonian and, upon his release from the Navy in 1970, moved his family to Oregon. In 1981 plaintiff's wife divorced him. Plaintiff went to Arkansas briefly, then to Idaho. During the period from 1982 to 1984 plaintiff remarried and lived and worked in Idaho. In November 1984 plaintiff again divorced and returned to Oregon.

Plaintiff was in Oregon from November 1984 to March 1985 living with a friend and looking for work. He testified that he obtained a temporary appointment with the Bonneville Power Administration (BPA) and moved to Vancouver, Washington, his "duty station." Plaintiff worked in Montana and other parts of Washington while employed by BPA. However, he continued his contacts with Oregon, including obtaining an Oregon driver's license and maintaining an Oregon bank account. Plaintiff's appointment with BPA expired in October 1985 whereupon he moved to Portland and rented an apartment. Plaintiff drew unemployment benefits from Washington state from October 1985 until August 1986.

Plaintiff filed a federal income tax return for 1985 showing an Oregon address but did not file an Oregon income tax return. Plaintiff testified that he moved to Portland to file a complaint against BPA for refusing to hire him on a permanent basis.

In August 1986 plaintiff left Oregon to travel and work in Washington. He returned to Oregon in November 1987 where he remained until March 1988 when he moved to Arkansas. While in Arkansas plaintiff married for the third time. He remained in Arkansas until April 1990 when he returned to Oregon. He currently resides in Oregon.

Plaintiff's primary arguments against his being domiciled[1]

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[1] ORS 316.027(1) provides:

"(1) 'Resident' or 'resident of

in Oregon during 1985 are: (1) He came to visit a friend after his divorce; and (2) he is unable to practice his trade as an electrician in Oregon.

Domicile occurs when an individual establishes an abode and intends to remain there permanently or indefinitely. Reed's Will, 48 Or 500, 87 P 763 (1906). To change one's domicile, a person must: (a) establish a residence in another place; (b) intend to abandon the old domicile; and (3) intend to acquire a new domicile. Elwert v. Elwert, 196 Or 256, 248 P2d 847 (1952).

Based on the evidence, the court finds that plaintiff was domiciled in Oregon during 1985. Although plaintiff contends he

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this state' means:

"(a) An individual who is domiciled in this state unless he (A) maintains no permanent place of abode in this state, and (B) does not maintain a permanent place of abode elsewhere, and (C) spends in the aggregate not more than 30 days in the taxable year in this state; or

"(b) An individual who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than 200 days of the taxable year in this state is presumed to be a resident unless the individual proves that the individual is in the state only for a temporary or transitory purpose.

"(2) for purposes of paragraph (b) of subsection (1) of this section, a fraction of a calendar day shall be counted as a whole day."

was just visiting in Oregon, he established an abode here, obtained a driver's license and opened a bank account. He attempted to obtain an Oregon electrician's license and in general acted as if Oregon where his residence. These facts indicate an intent to abandon his domicile in Idaho and establish a domicile in Oregon.

The court further finds that plaintiff did not abandon his Oregon domicile until after 1985. During the period that plaintiff worked for the BPA in Washington and Montana, he continued to maintain his ties with Oregon. Until he moved to Arkansas, he returned to Oregon after temporary absences and maintained the type of contacts with Oregon which evidence an intent to remain domiciled in Oregon.

Based on the above findings, defendant's Opinion and Order No. 91-0940 must be sustained. Costs to neither party.

Dated this 9th day of March, 1994.

/s/ Carl Byers

Judge

APPENDIX C

STATE OF OREGON

DEPARTMENT OF REVENUE

In the Matter of the Appeal	)	
	)	
of	)	OPINION AND ORDER
	)	
John D. Morris from an Act of the State of Oregon Concerning Certain Personal Income Tax Matters for Tax Year 1985	)	No. 91-0940

The petitioner has appealed a Notice of Determination and Assessment issued July 12, 1989, by the Department of Revenue for failure to file a personal income tax return for tax year 1985.

At issue is whether an appeal was filed within the period provided under ORS 305.280 to establish jurisdiction for the department to hear the merits of the case.

A telephone hearing was held January 22, 1992, at 2 p.m. before Glen E. Pfefferkorn, Hearings Officer. Participating in the hearing were John Morris, the petitioner; and Bruce Hale, an auditor representing the Department of Revenue Audit Division.

John Morris testified he grew up in Arkansas. From 1970 until

1981 he lived in a house he owned in Oregon. In 1981 he and his wife divorced. His former wife was awarded the house and $1,500 per month alimony payments. Homeless and without resources to pay alimony, he moved to Washington as a disenfranchised Oregon citizen.

In early 1982 he went to Arkansas. About mid-year he moved to Idaho. He remarried and lived there until late 1984. He had an Idaho driver's license and filed Idaho tax returns. During January and February 1985, he lived with a former neighbor in St. Helens, Oregon. From March to October of that year he worked for Bonneville Power, construction branch, headquartered in Vancouver, Washington. His job locations were Missoula, Montana and Sheldon, Washington.

In October he returned to Oregon and rented an apartment in Portland. He was unemployed and drew unemployment insurance from Washington. He remained in Oregon until August 1986. During that time he filed his 1985 federal tax return using an Oregon address.

In August 1986 he left for an around-the-world trip. Upon his return he lived in Nevada during early 1987. From June to November of that year he worked in Wenatchee, Washington, again

for Bonneville Power Administration.

In November 1987 he returned to Oregon and rented a trailer in St. Helens, Oregon. He remained until March 1988, when he left for Arkansas. He stayed there until April 1991, when he returned to Oregon. Mr. Morris was last registered to vote in 1980. He was not a union member during the year at issue. He belongs to only one organization, Idaho Elks. In 1985 he attempted to renew his Oregon electrician's license but was unsuccessful.

Bruce Hale testified that the department's assessment was based on information from the Internal Revenue Service that the petitioner had filed an 1985 federal tax return from an Oregon address. He also determined from Division of Motor Vehicle records that the petitioner obtained an Oregon driver's license on June 3, 1985. The Notice of Determination and Assessment mailed to the petitioner's address at PO Box 1318, St. Helens, Oregon, was returned unclaimed. He asserts the petitioner was an Oregon resident during 1985.

OPINION OF THE DEPARTMENT

The Notice of Assessment issued by the department was dated July 12, 1989. Under ORS 305.280(2) the petitioner had 90 days to file

an appeal. His appeal was not received until April 24, 1991. There is no question the appeal was beyond the period provided by statute. However, under ORS 305.295 we must determine whether the department assessed tax to an individual who is not within its jurisdiction to tax. We must determine whether Mr. Morris was a domicile of Oregon during 1985.

In Elwert v. Elwert, 196 OR 256, 264-205 (1952), the court said:

> No single word in the legal vocabulary is more difficult than "domicil" to define accurately.

In Reed's Will, supra, at 504, this court said:

> Domicile, strictly speaking, is a relation the law creates between an individual and a particular place or country, and each case is dependent upon its particular facts. It is not in a legal sense synonymous with residence. . . .To constitute domicile there must be both the fact of a fixed habitation or abode in a particular place, and an intention to remain there permanently or indefinitely; . . . .Domicile, therefore, is made up of residence and intention. Neither, standing

> alone, is sufficient for the purpose. Residence is not enough, except as it is cojoined with intent which determines whether its character is permanent or temporary, and clearly a mere intent cannot create a domicile. . . .

Again, in Elwert, 196 OR at 265, the court said:

> A person does not acquire a new domicil by merely going to another place with intent of making it his domicil. More is required in the eyes of the law. Such intention must be supported with an intention (1) of residing in a new place for a more or less indefinite time, and (2) of making the new place his home within the meaning "home" as that term is used in the law of domicil. 17 Am Jur, Domicil 604, §23. In Restatement, Conflict of Laws, 39, §20, we find: "For the acquisition of a domicil of choice, the intention to make a home must be an intention to make a home at the moment, not to make a home in the future."

Mr. Morris testified that when he left Oregon in 1981, he intended

to leave permanently. He had lost his home in a divorce. He was ordered to pay $1,500.00 per month alimony, and he had no stable income source to make such payments. He felt he had no choice but to leave the state. It was four years later in early 1985 that he returned to Oregon. During his absence he lived in Idaho, filed tax returns with that state, had an Idaho driver's license, and resided there with his new wife. The roots established there indicate he changed his domicile from Oregon.

The question then is whether the time spent living with his former neighbor in January and February 1985, and living in Oregon after October 1985 when he rented an apartment in Portland, changed his domicile back to Oregon. During the time he resided here that year, he was unemployed. He did open a bank account to conduct business. His employment, when available, was with Bonneville Power Administration, construction branch, headquartered in Vancouver, Washington. He testified he returned to be near his former neighbors and friends. After his marriage ended in Idaho in late 1984, he had more transitory roots. However each time he left Oregon he returned. This action shows he considered Oregon home.

Based on these facts, the department is persuaded that Mr. Morris was an Oregon domicile during 1985. Therefore he must appeal

within the time limits of ORS 305.280(2). Stokes v. Dept of Rev. 10 OTR 56 (1988). Since he did not appeal within 90 days, the appeal must be dismissed for lack of jurisdiction.

IT IS SO ORDERED.

The amount now due and owing is:

Tax Year	Tax	50% Penalty	Warrant Fee	Interest	Balance
1985	$2,035	$1,017.50	$10.00	$1,801.18	$4,863.68

APPENDIX D

STATE OF OREGON

DEPARTMENT OF REVENUE

In the Matter of the Appeal of John D. Morris from an Act of the State of Oregon Concerning Certain Personal Income Tax Matters for Tax Year 1985.	))))))))	OPINION AND ORDER No. 91-0940

[Draft Opinion and Order in favor of John D. Morris as prepared by Hearings Officer Pfefferkorn prior to its being changed by the chief, hearings officer who did not participate at the hearing]

(Last page) (No other changes made to Opinion and Order)
The question then is whether the time spent living with his former neighbor in January and February 1985, and living in Oregon after October 1985 when he rented an apartment in Portland, changed his domicile back to Oregon. During the time he resided here that year, he was unemployed. He did open a bank account to conduct business. His employment, when available, was with Bonneville Power Administration, construction branch headquartered in Vancouver, Washington. He tried to renew his Oregon electrician's license so he could work in Oregon. He was unable to renew that

license.

Based on these facts, the department is persuaded that Mr. Morris was not an Oregon domicile during 1985, during the time he earned income. If renting an apartment in Portland re-establishes Oregon domicile, that occurred in October 1985, and he was unemployed from then until the end of the year. The department cannot emphasize too strongly that an individual who chooses to ignore correspondence from the Audit Division does so at his or her peril. In failing to appeal within 90 days of the assessment, Mr. Morris came as close as anyone can to having his appeal dismissed. Nonetheless, the department is of the opinion that the relationship between the facts of this case and ORS 305.265(15) and 305.295(1)(a) is s